2011 WL 9556447 (Hawai'i App.) (Appellate Brief)
Intermediate Court of Appeals of Hawai'i.

ORI ANUENUE HALE, INC. and Opportunities for the Retarded, Inc., Applicants-Appellants,
v.
KASAN CONSTRUCTION CORP., Respondent-Appellee.

No. CAAP-10-0000043.
February 7, 2011.

Special Proceedings No. 10-1-0213
Appeal from:
1. Order Denying Applicants' Motion Filed July 6, 2010, to Vacate Arbitrator's Final Award and Granting Respondents' Request for Confirmation of Arbitration Award, filed on August 31, 2010; and
2. Judgment, filed on October 19, 2010.
First Circuit Court
Honorable R. Mark Browning

Applicants-Appellants' Opening Brief

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***1 I. STATEMENT OF THE CASE**

A. Nature of the Case

This is an appeal from an order of the Circuit Court for the First Circuit denying Appellants' motion to vacate an arbitration award. The basis for the motion was that the award issued by the Arbitrator violated the public policy of the State of Hawaii by granting a mechanic's lien and monetary judgment for work performed by unlicensed contractors.

The Motion was filed on July 6, 2010. Record on Appeal ("RA") at 14. Argument on the motion took place on August 16, 2010. See Appellate Docket Entry 19, Transcript of Proceedings on August 31, 2010 ("Tr."), at 1. The Circuit Court rendered a ruling from the bench at that time. Tr. at 7-9. The Circuit Court issued and entered its Order Denying Applicants' Motion Filed July 6, 2010, To Vacate Arbitrator's Final Award and Granting Respondents' Request for Confirmation of Arbitration Award (the "Order"). RA at 259-277

B. Statement of Facts

1. The Parties And Their Relationship

Applicant-Appellant ORI ANUENUE HALE, INC. ("ORI") is a Hawaii nonprofit corporation, which is dedicated to providing services to the **elderly**, the disabled and the economically disadvantaged. ORI is an affiliate and offshoot of Applicant-Appellant Opportunities for the Retarded, Inc., which has been providing the means by which adults with mental retardation/developmental disabilities can become productive, contributing members of Hawaii for over 25 years. [1] RA at 31 (¶¶ 1-3).

***2** ORI entered into a contract with Building Tech, Inc. ("Building Tech") for the construction of 10 Group Homes. RA at 31 (¶ 4) and 35-37 (Exhibit 1). Building Tech was not a licensed contractor. RA at 33-34 (¶ 18-19) and 55-64 (Exhibit 7).

Building Tech subcontracted with Respondent-Appellee KASAN CONSTRUCTION CORP. ("Kasan") for the actual construction of the homes. RA at 32 (¶ 5) and 38-40 (Exhibit 2). [2]

None of the contracts executed by Kasan or Building Tech contained the disclosures of lien rights or other information required by Haw. Rev. Stat § 444-25.5. RA at 35-37 (Exhibit 1) and 38-40 (Exhibit 2).

According to the on-line files of the Professional and Vocational Licensing Division of the Department of Commerce and Consumer Affairs, Kasan holds the following licenses:

B General Building

C04 Boiler, Hot-Water Heating & Steam Fitting

C37 Plumbing

C40 Refrigeration

C52 Ventilating & Air Conditioning

RA at 32 (¶ 6) and 41-42 (Exhibit 3).

Pursuant to Haw. Admin. Code § 16-77-32, a General Building license holder also automatically holds the following specialty classifications:

C-5 Cabinet, Millwork, and Carpentry Remodeling and Repairs;

C-6 Carpentry Framing;

C-10 Scaffoldin;

C-12 Drywall;

C-24 Building Moving and Wrecking;

C-25 Institutional and Commercial Equipment;

C-31a Cement Concrete;

C-32a Wood and Vinyl Fencing;

C-42a Aluminum and Other Metal Shingles;

***3** C-42b Wood Shingles and Wood Shakes.

Kasan does not hold the "A" general engineering contractor classification. Kasan does not hold the C-17 classification for an excavating, grading, and trenching contractor. The C-17 classification is not included in the Building Contractor license, nor in any of the additional licenses held by Kasan.

Part of the contract to build the three Group Homes included the installation of sheet metal roofing, and ceramic tile work in the bathrooms. RA at 35-37 (Exhibit 1) and 38-40 (Exhibit 2).

Kasan does not possess either a general roofing license, or a C-44 sheet metal license, which would have permitted it to install the sheet metal roofing. Kasan does not possess a C-51 tile contractor license, which is required to perform ceramic tile work. RA at 32 (¶¶ 7-8).

Kasan has ***admitted*** that it ***retained unlicensed subcontractors*** to perform work on the project. These unlicensed subcontractors included "CJ Builders" and "ZY Construction", who performed work on the construction of the homes. RA at 32 (¶ 9); see also RA at 48-50.

2. The Mechanic's Lien Proceeding

A dispute arose between ORI and Kasan, regarding the work being performed and payment therefore. On October 12, 2006, Kasan initiated a Mechanic's Lien proceeding entitled *Kasan Construction Corp. vs. ORI Anuenue Hale, Inc., et al.,* M.L. No. 06-1-044, in the First Circuit Court of the State of Hawaii. RA at 32 (¶10).

On December 22, 2006, the Circuit Court entered a Stipulation Staying Action Pending Mediation and Arbitration and Order. RA at 32 (¶11) and 43-46 (Exhibit 4). The Stipulation and Order provided in pertinent part:

***4** 4. If Mediation is unsuccessful, and a Final Award is rendered by the Arbitrator which supports the imposition of a Mechanic's Lien, and the Award is not satisfied within 30 days of the date of issuance, upon motion by Lienor, the stay shall be lifted and a Mechanic's Lien shall attach in the amount specified by the Award as appropriate for a Mechanic's Lien.

5. If Mediation is unsuccessful, and a Final Award is rendered by the Arbitrator which precludes the imposition of a Mechanic's Lien, upon motion by a Respondent, the stay shall be lifted and an order entered denying the attachment of a Mechanic's Lien.

A part of the agreement was that, if Applicants-Appellants did not file a Motion to Vacate within 30 days, Kasan could seek to have the stay of the mechanic's lien procedure lifted and the lien attached. This was solely to permit Applicants-Appellants to move the case along, inasmuch as the attachment of the lien is only an interim procedure, with a foreclosure proceeding to follow. RA at 236 (¶ 3)

Applicants never agreed, and it was never the intent of the parties, to shorten the time for filing a Motion to Vacate to 30 days. If that had been the intent, the Stipulation would have said so, in no uncertain terms. RA at 236 (¶ 4). However, nowhere does the Stipulation state that any Motion to Vacate must be filed within 30 days, or that a failure to file within 30 days is a waiver of the right to seek to vacate the award. The only consequence of failing to file within 30 days, was the possible attachment of the lien.

Thereafter, arbitration was commenced before Hon. Patrick K.S.L. Yim, as arbitrator (the "Arbitrator"). RA at 33 (¶ 12).

***5 3. The Arbitrator's Interim Ruling Regarding Unlicensed Work**

ORI moved for a partial summary disposition of the claims of Kasan, upon the ground that Kasan had performed unlicensed work, including that performed by unlicensed subcontractors. RA at 33 (¶ 13).

This ruling, issued by Arbitrator Patrick Yim on July 30, 2007, affirmed that Kasan had performed unlicensed work, and had retained unlicensed subcontractors. RA at 33 (¶ 14). The ruling, RA at 47-52, provided in relevant part:

Essentially the issues raised by the motion are (1) Whether Kasan and its subcontractors were licensed to perform the work described in the instant motion; and (2) whether the laws of the State of Hawaii ***preclude the unlicensed contractor, Kasan, and its unlicensed subcontractors, CJ Builders and Pinko Corporation (aka Z&Y Construction) from getting paid for work which they are alleged to have performed*** and also precludes them from obtaining mechanic's liens for that work. [RA at 48 (emphasis added).]

***10. CJ Builder is an expired trade name for Jong Hub Kim. Neither CJ Builders nor Jong Hub Kim possesses any contractor's licenses.

11. Z&Y Construction is a trade name for Pinko Corporation, whose president and director is Zhang Yunguang (aka "Afong").

12. Neither Pinko Corporation, nor Z&Y Construction, nor Zhang Yunguang possess any contractors' licenses.

13. Neither Pinko Corporation nor Z&Y Construction, nor Zhang Yunguang contracted with the Movant to perform any of the claimed construction work.

14. Though Kasan claims that they were "employees", it failed to provide any documentary evidence that Zhang Yunguang or Afong or Z&Y Construction or Pinko Corporation or CJ Builders was an "employee." Kasan has not offered any records of any payment of ***6** a salary to any of them, or any record of payment of any State of Hawaii taxes, including any taxes, including payroll and withholding taxes for them under the tax laws of the United States of America.

15. Further, Kasan failed to produce for its "employees" any Form W-4, Form 1-9, or Form HW-14 to show that any person performing work upon which its claim of payment is based was an employee for whom Kasan withheld any taxes. [RA at 50-51.]

***21. The motion specifically addresses the certain construction work and services performed on the project which remain unpaid by the Movant which consists of the following: a) grading and excavation services pertaining to site preparation, b) electrical, cable and telephone trenching work, c) sheet metal roofing installation work, and e) ceramic tile installation work. [RA at 51.] ***

34. Kasan failed to produce any evidence that it or the subcontractor was licensed to perform grading and excavation services pertaining to site preparation.

35. Kasan failed to produce any evidence that it or the subcontractor was properly licensed to install the sheet metal roofing panels for the project.

36. Kasan failed to produce any evidence that it or the subcontractor was properly licensed to install the ceramic tile for the project. [RA at 52]

Thereafter, Kasan moved for reconsideration of the ruling, arguing that Kasan was entitled to be compensated for work performed by unlicensed subcontractors. RA at 33 (¶ 15).

The Arbitrator granted this ruling, and in violation of the public policy of the State of Hawaii, ordered that Kasan could recover for, and obtain a lien for, work performed by unlicensed contractors. In that ruling, the Arbitrator did not reverse any of the findings and rulings quoted above. He merely ruled that Kasan could seek reimbursement for work that was ***7** within its own license, even if it was actually performed by an unlicensed subcontractor. RA at 33 (¶¶ 16-17) and 53-54 (Exhibit 6).

4. The Consent Order Regarding Building Tech

On May 4, 2009, during the course of the arbitration hearings, a Consent Judgment was filed in Circuit Court of the First Circuit for the State of Hawaii in *State of Hawaii vs. Building Tech, Inc.,* S.P. No. 09-1-0141 VSM. RA at 33 (¶ 18) and 55-64 (Exhibit 7).

The Statement of Alleged Violations of Law and Reasons for Entering Into Consent Judgment submitted to the Court include the following statements:

2. On or about January 24, 2005, in the City and County of Honolulu, State of Hawaii, Respondent [Building Tech] entered into a contract with ORI Anuenue Hale, Inc., for the development and construction of three (3) units of Residential Development at 64-1510 Kamehameha Highway, Wahiawa, Hawaii 96786 (the “Project”) for compensation.

3. Respondent, by engaging in the above-described conduct, engaged in the business of and acted as a “contractor” as defined in HRS § 444-1.

4. Respondent is not now, nor has Respondent ever been, licensed by the Contractor's Board as a “contractor” under HRS Chapter 444.

5. Respondent, by contracting for the Project, performed the work of contractor without a license in violation of HRS §§ 436B-27, 444-9, 480-2 and 487-13(a).

RA at 57-58.

Pursuant to this Consent Judgment, it became clear that Building Tech was acting as an unlicensed general contractor, and that Kasan was therefore a subcontractor to an unlicensed general contractor. When this issue was raised in the Arbitration, the hearings were ***8** suspended, while discovery on the issue was conducted. Thereafter, the hearings continued. RA at 34 (¶¶ 19-20).

5. The Arbitration Award

On March 3, 2010, the Arbitrator entered his Partial Final Award, in which, in accordance with his order on reconsideration, he awarded damages and a mechanic's lien to Kasan for work performed by unlicensed subcontractors. RA at 34 (¶ 21) and 65-78 (Exhibit 8).

In that award, the Arbitrator also issued his Award as against Opportunities for the Retarded, Inc., despite the fact that this entity owned none of the land, and entered into none of the contracts, with Kasan. RA at 34 (¶ 22) and 65-78 (Exhibit 8).

In that award, the Arbitrator further violated the public policy of the State of Hawaii, by ruling that Kasan could recover a mechanic's lien and damages, even though it was itself the subcontractor of an unlicensed contractor, Building Tech. RA at 65-78 (Exhibit 8).

In that award, the Arbitrator further violated the public policy of the State of Hawaii, by ruling that Kasan could recover a mechanic's lien and damages, despite the unquestioned failure of the contracts to contain the disclosures of lien rights or other information required by § 444-25.5.

Following an award of attorneys' fees, the Partial Final Award was incorporated into the Final Award, RA at 34 (¶ 23) and 79-81 (Exhibit 9).

6. The Ruling Of The Court On The Motion To Vacate

As noted above, Applicants-Appellants moved to vacate the Final Award. The Court denied the motion, setting forth its reason on the record, namely, that there was no strong public policy barring payment for the work by unlicensed contractors:

***9** In order to set aside an arbitration award as against public policy, the Court must determine, one, that the award would violate some explicit public policy that is well-defined and dominant, and that is ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests; and two, the violation of public policy is clearly shown. Kona Village Realty, Incorporated versus Sunstone Realty Partners, XIV, LLC, 214 P.3d 1100, on page 1106, Hawaii Appellate 2009. Citing Union versus Misco, Incorporated, 484 U.S. 29 page - rather 25, page 29, 43 and 44, a 1987.

In Kona Village, as I said earlier, the Court held that an award of attorneys' fees greater than 25% of the arbitration award was not against public policy because it was not in the role of the Court to establish a new rule of law mandating a cap on attorneys' fees awarded in arbitration, and that that was a matter for legislative action or the parties' own agreement.

While in this case Mr. Batterman does make a very good argument that there is at least in this Court's opinion the hint of public policy behind some of the statutes cited. There is, quote, no well-defined and dominant public policy shown which would evidence a violation for purposes of this particular proceeding of public policy in this case. Therefore, the Court will again reiterate its ruling and grant its motion or rather deny the motion at hand and confirm the arbitration award as are requested by the respondent in this case.

Appellate Docket Entry 19, Tr. at 8-9.

II. STATEMENT OF POINTS OF ERROR

The Circuit Court's oral ruling denying the motion to vacate erroneously found that there was no public policy which was violated. The error is contained in the ruling found in Appellate Docket Entry 19, Tr. at 9, lines 12-17. The error was brought to the attention of the court in the briefing (RA at 22-29 and 231-235) and in oral argument Appellate Docket Entry 19, Tr. at 3-5.

***10 III. STANDARD OF REVIEW**

The Appellate Courts review the circuit court's ruling on an arbitration award *de novo. Kona Village Realty, Inc. v. Sunstone Realty Partners XIV, LLC,* 121 Haw. 110, 112, 214 P.3d 1100, 1102 (Haw. App. 2009).

IV. ARGUMENT

A. The Court Below Erred In Disregarding The Strong Public Policy Of Hawaii As Codified In The Contractors' Licensing Law And Mechanic's Lien Law, Barring Recovery For Unlicensed Work

It is undisputed that there is a "public policy exception to the general deference given arbitration awards." *Inlandboatmen's Union of the Pacific v. Sause Bros., Inc.,* 77 Haw. 187, 194, 881 P.2d 1255, 1262 (Haw. App. 1994). The standard, adopted from *United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 43, 108 S. Ct. 364, 373, 98 L.Ed.2d 286, 302 (1987), was set out by the court as follows:

> Under *Misco,* the test established for application of the public policy exception requires a court to determine that (1) the award would violate some explicit public policy that is well defined and dominant, and that is... ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests, and (2) the violation of the public policy is clearly shown.

Inlandboatmen's Union, 77 Haw. at 193-94, 881 P.2d at 1261-62 (brackets, internal quotation marks and citations omitted).

Thus where the public policy is clear, the Courts will not confirm an arbitration award that serves to contravene it. In this regard, it would be hard to imagine a public policy more clear or well defined than that which bars a recovery for the work of unlicensed ***11** contractors. It is explicitly enshrined in numerous statutes, and has been repeatedly cited, again and again, by Hawaii's Appellate Courts.

The recitation of laws barring unlicensed contractors begins with Hawaii Revised Statutes § 444-22, which provides:

> The failure of any person ***to comply with any provision of this chapter*** shall prevent such person from recovering for work done, or materials or supplies furnished, or both on a contract or on the basis of the reasonable value thereof, in a civil action, if such person failed to obtain a license under this chapter prior to contracting for such work. [Emphasis added.]

The strong public policy in this area is codified, not just in Haw. Rev. Stat. § 444-22, but also in the Mechanic's Lien Law, Haw. Rev. Stat. § 507-49 (b), which provides:

> (b) Anything contained in this chapter to the contrary notwithstanding, ***no general contractor*** as defined in this chapter ***or the general contractor's subcontractor or the subcontractor's subcontractor*** who is required to be licensed pursuant to chapter 444 shall have lien rights ***unless the contractor was licensed pursuant to chapter 444 when the improvements to the real property were made or performed, and no subcontractor*** or subcontractor's subcontractor so licensed ***shall have lien rights if the work was subcontracted to them by a general contractor as defined in this chapter*** or the general contractor's subcontractor who was required to be licensed but was not licensed pursuant to chapter 444. [Emphasis added.]

The Courts have repeatedly stressed the strong public policy set forth in these statutes. As the Hawaii Supreme Court stated in *Butler v. Obayashi,* 71 Haw. 175, 176, 785 P.2d 1324, 1325 (Haw. 1990)(emphasis added) :

> HRS Chapter 444, providing for the licensing of contractors expresses ***a very strong public policy*** that contractors in this state should apply for, and receive licenses, and the provisions of HRS § 444-22, ***which are sweeping in their terms,*** are obviously intended to produce harsh results in furtherance of that policy. ***No exception is made in the statute for persons having knowledge*** ***12** ***of the fact that the contractor is unlicensed,*** and we therefore cannot engraft on the plain words of the statute such an exception.

As was made clear in *Shultz v. Lujan,* 86 Haw. 137, 143 n.7, 948 P.2d 558, 564 n.7 (Haw. App. 1997), this proscription expressly applies in Arbitration:

> While HRS § 444-22 does not expressly define "civil action" as including arbitration, such an inclusion is implicit, because confirmation of an arbitration award must occur in circuit court. This confirmation constitutes a civil action ***which is prohibited by HRS § 444-22.*** [3]

The Hawaii courts have repeatedly explained the importance of this public policy, and protected it against efforts to diminish it. Thus, in *Butler v. Obayashi,* 71 Haw. 175, 177, 785 P.2d 1324, 1325 (1990) the Supreme Court held that despite a contracting party's knowledge of the contractor's unlicensed status, suit by the unlicensed contractor against that party was barred.

The importance placed on this public policy was stressed again in *Jones v. Phillipson,* 92 Haw. 117, 123, 987 P.2d 1015, 1021 (Haw. App. 1999)(emphasis modified):

The Hawai'i Supreme Court has indicated that "HRS [c]hapter 444, providing for the licensing of contractors[,] expresses a very *strong public policy* that contractors in this state should apply for, and receive licenses, and the provisions of HRS § 444-22, which are sweeping in their terms, are obviously intended to produce harsh results in furtherance of that policy." *Butler v. Obayashi,* 71 Haw. 175, 177, 785 P.2d 1324, 1325 (1990) (emphasis added). Thus, in *Butler,* the supreme court held that ***despite a contracting party's knowledge of the contractor's unlicensed status, suit by the unlicensed contractor against that party was barred.*** *Id.* Clearly, then, ***a contractor's claim to recover compensation for unlicensed work may not be*** ***13** ***enforced in our courts.*** *See* *Shultz v. Lujan,* 86 Hawai'i 137, 141, 948 P.2d 558, 560 (App.1997).

The *Phillipson* court further went on to explain, 92 Haw. at 125, 987 P.2d at 1023 (court emphasis in italics)(footnote omitted). The purpose behind requiring contractor licensing was to "***protect the general public*** against dishonest, fraudulent, ***unskillful*** or ***unqualified*** contractors." Sen. Stand. Comm. Rep. No. 630, in 1957 Senate Journal, at 617.

HRS § 444-4 confirms this purpose in providing that a contractors' licensing board "shall... [a]dopt, amend or repeal such rules... to effectuate [HRS] chapter [444] and ***carry out the purpose thereof, which is the protection of the general public."***

Various amendments have been made to HRS chapter 444, but the primary purpose of the chapter remains intact. A recent legislative report observed that

[HRS] [c]hapter 444 requires that individuals licensed as contractors pass a written exam and meet the experiential requirements set by the board. Licensed contractors are also required to maintain workers' compensation and liability insurance. ***These laws were enacted, in part, to ensure the health and safety of the public by requiring that contractors possess a minimum level of expertise, experience and training.*** [4]

To permit a general contractor to perform an "end run" around the law, by allowing an unqualified, untrained and unlicensed subcontractor to do the actual work, would eviscerate the purpose of the law. It would also improperly reward a general contractor for entering into an illegal subcontract. *Cf. Highpoint Townhouses, Inc. v Rapp,* 423 A.2d 932 (D.C. App. 1980)(unlicensed subcontractor was not entitled to a mechanic's lien since its underlying contract to provide plumbing services to a general contractor was illegal).

***14** In addition, it would permit a general contractor to collect for unlicensed work without ever having to incur any expense of its own. A general contractor could, as Kasan did here, engage unlicensed contractors for almost all of the work performed on a job site. After fobbing off this unqualified work as its own, the general contractor could collect for the work performed - without ever having to pay the subcontractors who did the actual work, since the subcontractors are barred from suing to collect under Haw. Rev. Stat § 444-22. [5]

It is especially vital that this public policy, if it is to have any force and effect, be applied to an arbitration award, such as the one here, which completely vitiates the purpose of the law. As this Court is undoubtedly aware - and as the Court in *Shultz v. Lujan* must have been aware - many construction contracts disputes are resolved in arbitration, as construction contracts routinely contain arbitration clauses. If arbitrators are free to ignore the strong public policy barring recovery by unlicensed contractors, the policy will lose a great deal of vitality, and consumers will be largely unprotected.

B. The Court Below Erred In Disregarding The Strong Public Policy Of Hawaii Protecting Consumers

A similarly strong public policy protection is found in Haw. Rev. Stat § 444-25.5. That statute applies to residential real property, such as the group residential homes at issue here. It requires that a contract for home construction include disclosures regarding lien rights and bonding:

15** ***§ 444-25.5 Disclosure; contracts.

(a) Prior to entering into a contract with a homeowner involving home construction or improvements and prior to the application for a building permit, licensed contractors shall:

(1) Explain verbally in detail to the homeowner all lien rights of all parties performing under the contract including the homeowner, the contractor, any subcontractor or any materialman supplying commodities or labor on the project;

(2) Explain verbally in detail the homeowner's option to demand bonding on the project, how the bond would protect the homeowner and the approximate expense of the bond; and

(3) Disclose all information pertaining to the contract and its performance and any other information that the board may require by rule.

(b) All licensed contractors performing home construction or improvements shall provide a written contract to the homeowner. The written contract shall:

(1) Contain the information provided in subsection (a) and any other relevant information that the board may require by rule;

(2) Contain notice of the contractor's right to resolve alleged construction defects prior to commencing any litigation in accordance with section 672E-11;

(3) Be signed by the contractor and the homeowner; and

(4) Be executed prior to the performance of any home construction or improvement.

(c) For the purpose of this section, 'homeowner' means the owner or lessee of residential real property, including owners or lessees of condominium or cooperative units.

(d) Any violation of this section shall be deemed an unfair or deceptive practice and shall be subject to provisions of chapter 480, as well as the provisions of this chapter.

***16** Failure to include those disclosures is a complete bar to obtaining a Mechanic's Lien. *Hiraga v. Baldonado,* 96 Haw. 365, 371, 31 P.3d 222, 228 (Haw. App. 2001). None of the contracts executed by Kasan or Building Tech contained the information required by § 444-25.5.

The importance of this policy was demonstrated in *808 Development, LLC v. Murakami,* 111 Haw. 349, 361, 141 P.3d 996, 1008 (Haw. 2006). The Hawaii Supreme Court held that there are no limitations or exceptions to the notice requirements of Haw. Rev. Stat. § 444-25.5, which are absolutely mandatory, regardless of the knowledge or actions of the homeowner.

C. The Court Below Erred In Not Finding That The Award Violated The Public Policy Of Hawaii

There can be no dispute that the actions of Kasan was in violation of all of these statutes, and the Award, accordingly, violated public policy. The facts are clearly set forth in the arbitration awards. The Arbitrator simply chose not to apply them. In so doing, he rendered an award which is deeply violative of Hawaii public policy, and in contravention of the command of Haw. Rev. Stat. § 444-22.

1. The Fact That Kasan Was Licensed Does Not Change The Public Policy Of Chapter 444

It is absolutely undisputed that Kasan hired unlicensed subcontractors, who performed most of the work on the Group Homes. This is a clear violation of Hawaii law and Hawaii public policy, which the Arbitrator simply chose to ignore.

Kasan argued, and the arbitrator ruled, that there is an allowable end-run around the law, by having unlicensed subcontractors do the work for a licensed contractor. This is every bit as violative of public policy as if Kasan was wholly unlicensed.

***17** The only case law which Kasan has ever cited for this unique, alternative interpretation of the statute is *Westchester Decorators, Inc. v. Perazzo,* 182 Misc.2d 806, 807, 701 N.Y.S.2d 820 (N.Y. App. Term. 1999). That case interpreted, not a state law, but a provision of the Westchester County Administrative Code, noting:

> The purpose of requiring a home improvement license is so that the owner has an entity that can be held accountable for any **abuses** and fraudulent practices (*see,* Westchester County Administrative Code § 863.311).

This is a far cry from the Hawaii Contractor's Licensing Law, which serves a broader purpose, as stated in *Jones v. Phillipson,* 92 Haw. 117, 125, 987 P.2d 1015, 1023 (Haw. App. 1999), cited above. The purpose of the law, and the public policy, is vitiated whenever payment is required, as it was here, for the work of an unlicensed contractor, be it the general contractor or the subcontractor.

2. The Fact That Kasan Was Licensed Does Not Change The Public Policy Regarding Mechanic's Liens

Kasan also argued, and the arbitrator ruled, that there is no impediment to a licensed contractor hiring an unlicensed subcontractor, and then claiming a lien for the unlicensed subcontractor's work. This is not the law, and operates as a clear violation of public policy in this areas

Haw. Rev. Stat § 507-49 (b) bars anyone from obtaining a mechanic's lien based on the work of an unlicensed contractor - not just the unlicensed subcontractor or sub-subcontractor, but all parties in the contractual line arising from that work:

> (b) Anything contained in this chapter to the contrary notwithstanding, ***no general contractor*** as defined in this chapter ***or the general contractor's subcontractor or the subcontractor's subcontractor*** who is required to be licensed pursuant to chapter 444 shall have lien rights ***unless the*** ***18** ***contractor was licensed pursuant to chapter 444 when the improvements to the real property were made or performed, and no subcontractor*** or subcontractor's subcontractor so licensed ***shall have lien rights if the work was subcontracted to them by a general contractor as defined in this chapter*** or the general contractor's subcontractor who was required to be licensed but was not licensed pursuant to chapter 444. [Emphasis added.]

Thus, in the first clause, the statute bars recovery to a "general contractor" or a "subcontractor" or a "subcontractor's subcontractor" from lien rights unless the "contractor" was licensed when the work was performed. The only purpose for including the entire contracting chain in the statute, would be to make it clear that, if the "contractor" who performed the actual work did not have a license, then anyone above the contractor in the chain cannot recover. Otherwise, the statute would simply have stated that anyone who did not have a license could not recover a mechanic's lien for the work it had performed.

That this is the purpose is made manifest by the second clause of this paragraph of the statute, which is the mirror image of the first clause: It bars a fully licensed subcontractor from recovering for work performed if it contracts with an unlicensed general contractor. It would render the public policy nonsensical to bar a licensed subcontractor for contracting with an unlicensed contractor; while at the same time rewarding the general contractor who deliberately contracts with an unlicensed subcontractor.

It is a "fundamental canon of statutory construction that 'courts are bound to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute."' *Beneficial Hawaii, Inc. v. Kida*, 96 Haw. 289, 309, 30 P.3d 895, 915 (Haw. 2001). "'Furthermore, the legislature is presumed not to intend an ***19** absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality."' *Id.*

This is also made clear by the legislative intent expressed in the legislative history of the statute. In the final House Committee Report on the Bill which became Haw. Rev. Stat. § 507-49, the following explanation was given as to the purpose of the statute:

> Mr. Speaker, this bill takes away the lien rights of suppliers who furnish material to unlicensed contractors or who unreasonably advance credit. [6] ***It also takes away the lien rights of a licensed or unlicensed contractor who subcontracts with an unlicensed contractor.*** [Emphasis added; see RA at 84.]

The Committee Report bespeaks a broad prohibition against anyone who subcontracts with an unlicensed contractor, from receiving a lien. That is in keeping with the strong public policy of the State of Hawaii. In this case, it applies in both directions - Kasan was the subcontractor to an unlicensed general contractor (Building Tech) and was itself a hirer of unlicensed sub-subcontractors.

As regards Building Tech in particular, the definition of a general contractor in Chapter 507 of the Hawaii Revised Statutes is located in Haw. Rev. Stat. § 507-41. It is a very broad definition:

§ 507-41 Definitions.

As used in this part, unless a definite meaning clearly appears from the context:

"General contractor" means a person who enters into a contract with the owner for the improvement of real property.

***20** The contract between Building Tech and ORI is clearly for the improvement of real property. The State of Hawaii, through the Regulated Industries Complaints Office of the Department of Commerce & Consumer Affairs, determined that Building Tech was required to be so licensed. Building Tech has agreed, and the First Circuit Court has confirmed the consent decree. The law, in turn, supports the determination.

The Definition of Contractor under Chapter 444 is found in Section 444-1, and provides an equally broad definition as does the Mechanic's Lien Law:

> 'Contractor' means any person who by oneself or through others ***offers to undertake,*** or holds oneself out as being able to undertake, or does undertake ***to alter, add to,*** subtract from, ***improve, enhance,*** or beautify ***any realty or construct,*** alter, repair, add to, subtract from, improve, move, wreck, or demolish ***any building,*** highway, road, railroad, excavation, or other structure, ***project, development, or improvement,*** or do any part thereof, including the erection of scaffolding or other structures or works in connection therewith.

Section 444-9 of the Hawaii Revised Statutes goes on to state:

§ 444-9 Licenses required.

No person within the purview of this chapter shall act, or assume to act, or advertise, as general engineering contractor, general building contractor, or specialty contractor without a license previously obtained under and in compliance with this chapter and the rules and regulations of the contractors license board.

Accordingly, as Kasan was acting as the subcontractor to an unlicensed general contractor, it was barred from asserting or obtaining a Mechanic's Lien.

***21 3. The Fact That Kasan Allegedly Did Not Know The Status Of Building Tech Does Not Impact Public Policy**

As regards the Mechanic's Lien statute, the Arbitrator attempted to perform an end-run around the statute by declaring that Building Tech was ORI's "agent". This does not alter the fact that Kasan was ***both*** the subcontractor of an unlicensed general contractor, and contractor to unlicensed subcontractors.

The fact that Kasan may not have been aware of Building Tech's status as an unlicensed contractor is irrelevant. The Hawaii Supreme Court has held, time and again, that this type of knowledge is not sufficient to obviate the commands of the public policy at issue. See, e.g, *Butler v. Obayashi,* 71 Haw. 175, 177, 785 P.2d 1324, 1325 (1990)(despite a contracting party's knowledge of the contractor's unlicensed status, suit by the unlicensed contractor against that party was barred); *808 Development, LLC v. Murakami,* 111 Haw. 349, 361, 141 P.3d 996, 1008 (Haw. 2006)(notice requirements of Haw. Rev. Stat. § 444-25.5 are absolutely mandatory, regardless of the knowledge or actions of the homeowner).

4. ORI Was Entitled To The Protection Of Section 444-25.5

Kasan has also attempted to argue that ORI was not entitled to the benefit of the public policy expressed in Haw. Rev. Stat. § 444-25.5, because the group homes are not residences, and ORI is not a natural person, and therefore not a "consumer" as defined in Chapter 480.

As to the former, Haw. Rev. Stat § 444-25.5 defines "homeowner" as the owner or lessee of residential real property, including owners or lessees of condominium or cooperative units. It clearly does not limit homeowners to natural persons, and contemplates owners of ***22** multiple units and multiple dwelling units. Given the broad remedial purposes of the law, it would clearly apply to the group residential homes at issue here, which are leased to tenants or occupants. In fact, during the arbitration, Kasan testified that HECO did not charge for the use of a transformer during construction of the group homes, because this was considered a "residential" project. RA at 237.

As to the latter, Kasan misreads Chapter 480. Haw. Rev. Stat § 480-12 provides: "Any contract or agreement in violation of this chapter is void ***and is not enforceable at law or in equity.***" Section 480-12 does not limit its effect only to contracts with "consumers".

The only place where being a "consumer" is relevant is in Haw. Rev. Stat § 480-2, which provides that "No person other than a consumer... may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section." Applicants-Appellants are not bringing an action seeking treble damages nor attorneys' fees under Haw. Rev. Stat § 480-13. They are merely citing § 480-12 as a defense, insofar as it renders Kasan's contracts void and unenforceable.

D. Kasan's Other Arguments Against Vacatur Were Without Merit

1. There Was No Agreement Shortening The Deadline For Filing A Motion To Vacate The Award

Kasan has argued that the Stipulation by which the matter was referred to mediation, was an agreement to shorten the time within which a motion to vacate could be brought. This was a misrepresentation of the terms of the Stipulation between the parties.

The Agreement between the parties did state that, if Applicants did not file a Motion to Vacate within 30 days, Kasan could seek to have the stay of the mechanic's lien ***23** procedure lifted and the lien attached. This was solely to permit Applicants to move the case along, inasmuch as the attachment of the lien is only an interim procedure, with a foreclosure proceeding to follow.

Applicants-Appellants never agreed, and it was never the intent of the parties, to shorten the time for filing a Motion to Vacate to 30 days. If that had been the intent, the Stipulation would have said so, in no uncertain terms. However, nowhere does the Stipulation state that any Motion to Vacate must be filed within 30 days, or that a failure to file within 30 days is a waiver of the right to seek to vacate the award. The only consequence of failing to file within 30 days, was the possible attachment of the lien.

Original counsel for Kasan, who negotiated the agreement, submitted a Declaration below. RA at 211-12. Nowhere in that declaration does that counsel state that it was agreed that a Motion to Vacate must be filed within 30 days, or that a failure to file within 30 days is a waiver of the right to seek to vacate the award. The original counsel for Kasan knew full well that this was not the agreement.

Current counsel for Kasan must have spoken to original counsel, in order to obtain the declaration, and must have been told that the parties never agreed to a 30 day deadline for filing the Motion to Vacate. Accordingly, for counsel to now represent to the Court that there was such an absolute deadline is highly inappropriate.

Furthermore, the non-existent "agreement" which Kasan is improperly seeking to manufacture is illegal. Haw. Rev. Stat. § 658A-4(c), a portion of the Revised Uniform Arbitration Act, expressly voids any effort to alter or waive the provisions of certain sections of the Revised Uniform Arbitration Act, including Section 658A-23:

> (c) A party to an agreement to arbitrate or arbitration proceeding ***shall not waive,*** or the parties ***shall not vary the effect of,*** the ***24** requirements of this section or section 658A-3(a) or (c), 658A-7, 658A-14, 658A-18, 658A-20(d) or (e), 658A-22, ***658A-23,*** 658A-24, 658A-25(a) or (b), or 658A-29. [Emphasis added.]

Section 658A-23 is the provision of the Revised Uniform Arbitration Act which governs the vacating of Arbitration Awards. It grants the parties 90 days from the award in which to file the motion. Applicants-Appellants' motion was properly brought less than 90 days after the final award. Accordingly, the Motion was timely. [7]

2. There Is No Provision For A Partial Vacatur

Kasan has also asserted that, even if part of the award is vacated, relating to the Group Homes, the remainder of the award can stand. However, while the law may allow clarification of an award, the law does not permit this sort of substantive modification. *See, e.g. Excelsior Lodge No. One, Independent Order of Odd Fellows v. Eyecor, Ltd.,* 74 Haw. 210, 221, 847 P.2d 652, 658 (Haw. 1992); *Association of Apartment Owners of Tropicana Manor v. Jeffers,* 73 Haw. 201, 830 P.2d 503 (1992). If the award relating to the Group Homes violated public policy, as is the case here, the entire award must be vacated.

V. CONCLUSION

There is a clear public policy in the State of Hawaii requiring that construction work be performed by licensed contractors - including subcontractors. The effect of the Arbitration Award was to violate that policy, by awarding a judgment and lien for work that was, without dispute, performed by unlicensed contractors. Accordingly, the Award should be vacated.

Footnotes

1 Applicant-Appellant OPPORTUNITIES FOR THE RETARDED, INC. is not a party to any of the contracts at issue in this dispute; and does not own the land which is the subject of the related Mechanic's Lien Proceeding. RA at 31 (¶ 3).

2 ORI also contracted with Kasan to perform certain site work, necessary for the construction of the homes. See, e.g., RA at 47.

3 Kasan has attempted to distinguish *Shultz v. Lujan* by arguing that it only applies to motions to confirm, and not motions to vacate. This is pure sophistry, as is demonstrated by the fact that the Court here, at Kasan' s request, confirmed the award -- a result which is barred under the law.

4 Kasan has argued that *Jones v. Phillipson*, demonstrates that there is no strong public policy, because it suggested in dicta that failure to plead a defense of illegality waived the defense of § 444-22. However, even in the absence of pleading, the defendant was allowed to assert that the contractor was barred from recovering for unlicensed work.

5 Indeed, that is exactly what Kasan did here - failed to pay Z & Y Corporation, one of the unlicensed contractors. RA at 82 (Exhibit 10, ¶3).

6 This is a reference to subparagraph “a” of HAW. REV. STAT. § 507-49.

7 The fact that the agreement was in the form of a Stipulation, or that the stay provided for by the Stipulation was “So Ordered” by the Court, does not alter the basic fact that the document at issue was a stipulation.

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